THE STATUS OF WILLIAM HOHENSOLLERN, KAISER OF GERMANY, UNDER INTERNATIONAL LAW

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From time to time as the war progressed, suggestions have been made that, when it had been fought out to a successful issue, a fitting personal punishment should be visited on those in high places who have been guilty of ordering the unspeakable barbarities that have given to this war so hateful a distinction.

This cry for justice has sunk deep in our hearts. Now, then, to give it satisfaction. On the one side to avoid a rancorous vengeance—whose sting might keep alive animosities,—on the other hand to so mete out and reason the award of justice that the public opinion of the world shall acclaim the verdict as just. This is the difficulty that meets us—this, the problem.

Suggestion has been made that the Kaiser, having fled into the Netherlands, should be extradited to Great Britain or to France. Already and during the pendency of the war the Kaiser has been indicted in some County of Great Britain for the deaths occurring in the Lusitania disaster. In the public prints a few days back it was stated that Mr. Clemenceau, Premier of France, had asked the head of the French Bar for a ruling as to whether, in his opinion, extradition could be had between France and the Netherlands.

That in spite of his many atrocious crimes for which if not committed in war, under the doctrine of qui facit per alium facit per se, the Kaiser could, under the common law, be tried and convicted, he must now go free because there

is no law according to the principles of our municipal or international law under which jurisdiction can be obtained of his person, or under which he may be convicted, is a conclusion absolutely shocking to the moral sense. That he should escape punishment for these barbarities because our municipal law prescribes various rules and regulations as to jurisdiction, and as to trial and condemnation, which cannot by any extension of their principles be applied to this case, would be monstrous. On the other hand, that we should make a law to fit his case without reference to the reasons at the base of all law, or that we should strain existing procedure to meet his case, and thereby falsify the principles of the law we were using for the purpose, would be to commit judicial murder and place him in the position of a martyr.

It is deemed that under the general principles of the law and of the growth of institutions, there is warrant for our visiting upon the Kaiser the just penalty of his offenses without contradicting any principles applicable, and so as to make his punishment conformable, in the absence of precedent, to the just reasoning of the law.

It is important that we should accomplish this result without straining laws intended to meet different conditions so as to make them apply to this extraordinary instance.

Under our municipal and international law there are two difficulties in the way of the prosecuting of the Kaiser.

1st. We must obtain jurisdiction of his person.

2nd. We must try to convict him of the perpetration of a crime (held to be such by common consent).

The crimes which the Kaiser has perpetrated have been as to situs committed in Belgium, the occupied portion of Northern France, the high seas (submarine operations). England and France (Zeppelin operations). The Kaiser has fled to Holland.

Under the circumstances different considerations of law, municipal and international, would apply under the extradition treaties, should France apply for extradition under its treaty with Holland for an offense committed in Northern France, or should England apply under its extradition treaty with the Netherlands, basing her application on the Lusitania murders or Zeppelin atrocities. In the event of the application by France, the question of the place of the crime would not be a bar to the application, because the crime has been committed in her territory. In addition to this, the continental nations do not give to the place of the crime that importance and consideration with reference to the place of trial which we common lawyers give, as witness the custom, for instance, of Italy in trying Italian citizens in Italy for crimes committed in the United States (which custom is the basis of their refusal to recognize that the Treaty of Extradition with the United States involves the citizens of the countries). But in the event of an application by Great Britain for extradition from the Netherlands, the application would be met by the suggestion that the crime had not been committed in Great Britain, and hence there is no jurisdiction to demand extradition.

Great Britain's only answer to this would be to set up a claim of constructive presence of the criminal in Britain through his having set forces at work in the foreign jurisdiction which consummated the crime in the bailiwick of the British County. As against this claim her own precedents might be cited against her.

Again, and as a basic fact underlying the whole application, the necessity of proving a crime to have been committed would be the great difficulty. This objection would apply to the French application under her treaty as well as to the British application under theirs.

Murder, which is the gravest crime under municipal law,

is not a crime under international law when perpetrated de jure belli.

There stands the lion in the path.

Because of this objection we are compelled in the last analysis to rely for the conviction of the Kaiser after extradition upon the international law declared by The Hague Conference as hereinafter discussed, and, since we are compelled to do this, to make out the crime itself, we might as well refer our right to extradition not to the treaties, which were never made to cover this instance, but to the same warrant, the international law of murder as declared by The Hague Conference, and the process of an international court.

For instance, an examination of the questions that would be presented on an application for extradition by Great Britain to Holland under the treaty of September 26, 1898 (British Treaty Series for 1899), will convince any lawyer that the difficulties of accommodating the treaty to the demand, make it practically inexpedient to attempt to adopt this device for the obtaining of the Kaiser's presence before the Tribunal. Omitting other questions, the suggestion of the questions arising out of constructive presence and the allegiance rule and a reference to the case of The King v. Depardo, 1 Taunt 26, and The People v. Adams, 3 Denio, 190, under the allegiance rule and to Strassheim v. Daily, 221 U. S. 280, 55 L. Ed. 735, as to constructive presence will sufficiently indicate the difficulties presented. So although the writer has not had the opportunity of studying a translation of the France-Netherland Treaty of Extradition, this is not of real materiality in the discussion. For as the policy of governments in extradition matters lead to similar provisions on these basic questions in all extradition treaties negotiated by them, this is not important. It may be deemed that the difficulties which arise in one case would exist in the other.

Resort, therefore, to extradition treaties to obtain jurisdiction of William's person is deemed to be inexpedient, and some other way must be found.

It is true that under the unique conditions of the problem, the gordian knot must, in the last analysis, be cut by force. But when so cut, let the force be frankly acknowledged, and let it be applied to vindicate law and order pursuant to the orderly and legal development of law along the lines of its growth. Let it not be a hidden application of force under a pretended compliance with established precedents when in fact these precedents have been repudiated and a fraudulent conclusion forced.

Force, after all, is the only arbiter of the destiny of the world; but this does not mean that we must use it without regard to justice and equity. And in the various modes of putting it into operation, and accepting the results, the only difference lies in whether force is applied haphazard according to the unrestrained will of the aggressor (the German Kultur doctrine), or whether the laws of nature and development are studied, and the attempt is then made to apply force only according to principles of justice and equity and right reason. This is the gulf that separated the ideals of the Germans from the ideals of the Allies,—a gulf as wide as infinity. We recommend a course of procedure belonging to the latter class.

What, then, is the sound policy? What the honest course to be adopted by the Allied Nations?

The answer is that we must take international law as it is, and proceed to develop it along the course of the development of all law, and so developing it on principles of justice and equity, we will be enabled to enforce against William the penalty for his crimes.

All law, municipal and international, has grown from usage and custom by a steady slow growth. The rules of municipal law, at one time moral, have become law when to

the consent of the majority that it was expedient—that a certain moral rule should be observed, has been added the sanction of a penalty for its violation under the government prescribing the law.

1 Oppenheim International Law, Ch. 1.

All law is by a fiction considered as law by the consent of the governed. This consent does not mean unanimous consent, for, if that were so, the individual criminal could set aside the law. The consent in the rule means a majority consent to have the rule apply and be enforced by a majority of the persons upon whom the law acts.

1 Oppenheim International Law, Ch. 1.

In municipal law this means the majority consent of the individuals constituting the state or sovereignty. In international law this means the consent of the majority of the nations constituting the Society of Nations (*Ibid.* Ch.1).

The conflict of opinion between the Analytical School of Austin and the Historical School as to the intrinsic nature of law may now be considered to be at an end. The theories of the Analytical School may be assigned to the limbo of exploded theories, the last resting place of similar fallacies such as the social contract theory of Rousseau.

Modern investigation, Maine, Spencer and others have developed the truth that law grows and develops from usage growing into custom and custom crystallizing into law until finally the existence of a centralized government enables it to add a sanction to a moral rule and so becomes full-fledged law.

International law is denied the name of law by the Analytical jurists, but is none the less law on that account.

We have now reached a period in the world's history when, even in the absence of a centralized authority embracing its field, it should be reinforced by a sanction to the extent required to meet the case and be made into

strict law by the majority consent of the Society of Nations prescribing a sanction for its violation. Thus and only thus can the moral sense of mankind, shocked by unheard of barbarities, be vindicated.

A society of nations practically constituting a *quasi* sovereignty and equivalent in international law to the society of individuals constituting a sovereignty in municipal law has been in existence since the year 1648, made memorable by the Treaty of Westphalia. Great Britain, Russia and Poland were not represented at the Westphalia Peace but came into this Society of Nations by common consent and their joinder in the later treaties. So from time to time other nations have become members of this body and by various treaties between the nations of the world of a law-making character, among them the Vienna Congress of 1815, the Treaty of London of 1831, the Declaration of Paris of 1856, the Geneva Convention of 1864, and various others, a Society of Nations has been constituted. This Society of Nations met in the years 1899 and 1907 and laid down pure law-making treaties comprising various conventions and declarations which became and were a prescription of the international law as applied to the conduct of states in peace and war by which the various signatories were bound.

It is true that as treaties or contracts between nations, these rules were agreed to upon two conditions. One that the signatory parties should not be bound by them in case of a war involving non-signatory powers, and the other, that they were to be obligatory during a limited time, namely, seven years. It is also true that the declaration of principles of morality contained in these treaties between nation and nation viewed as contracts, are necessarily limited in obligation by these clauses limiting them in time and occasion, yet they can not from the point of view of agreed declarations of moral truth, be so limited.

If Moses, in accepting the decalogue, had declared that the Jewish nation should not be bound thereby beyond ten years, the expressions of truth contained in that Code would have remained the same without regard to this express limitation.

In like manner, the other condition attached to the enactment of the Hague Rules, to the effect that they should not be binding except in the case of a war where all the belligerents are parties to the Convention, belongs also to the contractual part of the engagement. The true meaning of this reservation was, to leave the nations signing the Convention free to act so as to make reprisals upon an unbound Nation, which should resort to such practices in the war. The reservation of this freedom of action, under the circumstances in no way diminished the moral truth of the declaration. Especially was this true, so far as concerned the case in hand, for being merely a reservation of a right to be used if an unbound Nation resorted to such practices, it could not be held to apply, where the unbound Nation in the war did not act so as to justify a reprisal, and this was the case as it happened.

It follows, therefore, that the civilized nations of the world, prior to 1914, had, by common consent at The Hague Conference, declared certain moral rules to exist in respect to the conduct of nations in war. These customs and usages were thus made by common consent to apply to civilized nations, even in that province of their operation where, on account of the exigency of the occasion, it might be said that there was no law; or, that necessity knows no law (according to the German conception); yet, nevertheless, it is true that the civilized states of the world met and concluded upon a common ground to declare the rules they would be bound by, even in the abnormal conditions of the repudiation of all law known as the state of war.

(See the First Peace Conference at The Hague, July 29, 1899, and the Second Peace Conference, October 18, 1907.)

These rules, therefore, although limited in their operation as an obligation founded on contract to the seven years prescribed and the other contractual condition mentioned, remain as moral truths and moral rules recognized as such by all the nations of the world. That they should become laws binding on all nations waits only on the consent of the majority of nations recognizing them to prescribe a sanction for their violation.

Now, what have been the offenses against International Law which William has, under the guise of the German sovereignty, perpetrated upon the peoples of the nations which constitute the Society of Nations, and under which this Society of Nations is entitled, on principle and equity, to try and condemn him.

The answer is that the two Peace Conferences which were held at the Hague in 1899 and 1907, and which proceeded with the consent and approval of Germany to lay down certain principles to which Germany consented with reservations, sufficiently express the views of the Society of Nations as to the existence of certain ethical principles constituting customs and usages which did exist and should exist between them, and those usages have been violated by the Kaiser, representing Germany, and for those violations the Kaiser can be equitably and fairly punished without violating any moral rule.

Under the law—municipal and international—as it existed prior to the Hague Conference, murder occurring in the operations of war was not a crime. Under these conventions certain classes of murder occurring in the operations of war constitute a crime. For instance: At the Hague Conference, 1899, the Society of Nations agreed upon a number of points which were afterwards confirmed, though differently numbered by the Hague Conference of 1907.

Thus in the Regulations respecting the laws and cus-

toms of war on land, the following rules, among others, were agreed upon:

Sec. 2, Ch. 1, Art. 22,

"The right of belligerents to adopt means of injuring the enemy is not unlimited."

"Art. 23. In addition to the prohibitions provided by special conventions, it is especially forbidden:

"(a) To employ poison or poisoned weapons;

"(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

"(c) To kill or wound an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

"(d) To declare that no quarter will be given;

"(e) To employ arms, projectiles or material calculated to cause unnecessary suffering;

"(f) Omitted.

"(g) To destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

"(h) A belligerent is likewise forbidden to compel nationals of hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."

(2 Scott, Hague Conferences, 387, *Ibid.*)

"Art. 25. The attack or bombardment by whatever means of town, villages, dwellings or buildings which are undefended is prohibited."

Section III:

"Art. 46. Family honor and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected. Private property can not be confiscated." (*Ibid.* 397.)

"Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the

acts of individuals for which they can not be regarded as jointly and severally responsible."

"Art. 53. An army of occupation can only take possession of cash, funds, and realizable securities, which are strictly the property of state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the state which may be used for military operations."

"Art. 56. . . . All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made subject of legal proceedings."

(Scott, Hague Conference, 2 Vol. 401.)

A further convention was entered into to the effect that:

"Ch. 1, Art. 1. The bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings is forbidden." (*Ibid.* 439.)

Under a further provision it was agreed that military hospital ships should be respected and could not be captured. (*Ibid.*)

A further declaration was agreed upon prohibiting the discharge of projectiles and explosives from balloons to the following effect:

"The contracting powers agree to prohibit for a period extending to the close of the Third Peace Conference the discharge of projectiles and explosives from balloons or by other new methods of a similar nature. The present declaration is only binding on the contracting parties in case of war between two or more of them."

Scott, Vol. 2, p. 525.

In 1899 a further declaration prohibiting asphyxiating gases read as follows (2 Scott, p. 155):

"The contracting powers agree to abstain from the use of projectiles, the object of which is the diffusion of

asphyxiating or deleterious gases. The present declaration is only binding on the contracting parties in case of a war between two or more of them." (2 Scott, p. 155) and other rules not here quoted on account of lack of space.

These rules of war so laid down at The Hague Conference forbade the deportation of population of occupied territory, forced labor of civilians and prisoners, pillage, levies of excessive and improper fines, not to mention rape and cruelty, including treatment of prisoners, such crimes as the murder of Captain Frye, the naval and military bombardment of undefended towns, the use of asphyxiating gases, and the activities involved in the submarine and Zeppelin operations as carried on by the Germans.

As to the expediency of some of these rules different views might be entertained. But so far as concerns the rules applying to murder through the operations of Zeppelins, submarines and asphyxiating gases, the consensus of opinion of the civilized world is clear and unanimous. A conviction on these grounds alone would fully satisfy the requirements of the situation, and therefore these are the irreducible minimum now required to be prescribed and enforced by the Nations.

The truths involved in these declarations are moral truths. As a convention or treaty we can only claim according to the text, that they were obligatory on Germany for the time limited, but, as moral truths, they exist forever. In other words, as a treaty or contract, time and the other condition stated are the limit of the obligation, but as something agreed upon between the Society of Nations as a truth, the recognition of the moral principle involved extends beyond the contract limitations.

Of these rules of law, Germany and the Kaiser have throughout this war been the violators. She has not only been the criminal violator thereof in each and every instance, but has, in addition, publicly and intentionally and

wilfully done so, glorying in her denial of their existence or validity, and claiming that "might makes right."

Had Germany won this war, the Body of Customary usages and rules which for over two centuries we have known as "International Law" including these "Rules of the Hague" would have been cast into the scrap heap. The only law would have been Germany's will. Her Kultur would have illuminated and enslaved the world.

The war has had a different issue.

What shall be done to vindicate, to give sanction to those rules so wilfully and brutally violated?

Having by force established that rules of law and equity, customs, usages and laws still govern the relations of states, namely, the International Law of Peace and War, which had formerly existed, what must be the punishment which, in cool blood and as a matter of strict justice, should be meted out to the offender?

The answer is that just as the conditions have compelled us not to use "sweet reason" in restoring law and order to the world, but force, force to the utmost—so it is that in meting out justice to the criminal, no regard to the niceties of our municipal criminal laws and international extradition treaties should deter us from the proper action which the circumstances now impel. We must now use sufficient force to make the punishment fit the crime, and to insure the result that the sanction given to the rule shall be heeded in future.

Yet at the same time we will act on a well-reasoned basis of fairness and justice derived from our conception of morality and law implicated in our municipal laws and projected into the field of international law and so modulated by its contact with that field of chaos that only an insignificant exercise of force shall be necessary whereby to translate a moral rule into a law with its penalty and so produce justice in the premises. Again we shall act on the

principle that the rule of The Hague making murder in war under certain circumstances an international crime, has always existed as a moral truth untrammeled by the contract limitations clogging its declaration by the nations and now exists as a statute with its appropriate penalty, under which the criminal must suffer for the benefit of the community. In carrying out this theory, we are not hampered by the law of extradition, because the special court appointed by the majority of the nations will be given full power to compel the attendance of the criminal, and its jurisdiction will extend throughout the nations.

The consequence is that if Holland should attempt to question the process of the International Court so constituted requiring the presence of the alleged criminal, the question presented will not be the ordinary one that would arise on a failure to comply with the obligations of an extradition treaty, namely a liability to have its obligations enforced by an International War but would be the question of a citizen of the world Society of Nations failing to comply with its obligations as a citizen to that community. And as Holland is the land of The Hague—the nation which par excellence has accepted the jurisdiction of the Society of Nations—how could she stand out as the first conscious violator of the ordinances of the very Society of Nations she has fathered.

The Germans, by their ferocious and bestial methods, have acted in a manner without precedent in the conduct of this Society of Nations for over three centuries. We are consequently entitled, in maintaining our rule of law, to act without precedent under that law, but within the reason and necessity of the case. For them as for the Pirates an exception must be made.

Frankness and fairness requires us in creating this sanction for our International Law to do so without twisting and straining the provisions of the Municipal or International Law intended to meet other conditions, and to hon-

estly and clearly claim the right to do justice upon this government and sovereign upon the very principles of International Law which he and they have violated. Thus at the same time, establishing by the sanction thus given to the international custom—the custom as law and the punishment of the criminal—doing both on the basis of reason and common sense.

Murder of the kind perpetrated by the Kaiser in the use of asphyxiating gases, the submarine and Zeppelin operations, the Belgian atrocities and the Frye case, is a crime both under the municipal law and the international law of war as declared by The Hague and otherwise. It, then, should be punished as such.

Germany, by her high crimes and misdemeanors since 1914, is an outlaw. Whether she gave her consent to the principles of The Hague Conference of 1899 or 1907 for seven years, or more or less, is immaterial. She has placed herself beyond the pale. Her consent or dissent is of no importance.

We, the Allies, by virtue of our conquest of her, are the only ones to be considered on the question. We constitute the tribunal and the judge, and we should award and carry out the verdict.

Germany can only re-enter the Society of Nations by subscribing to this Code of The Hague Conference which we have elected to declare law. That Code declares that murder, perpetrated in war under the conditions stated, is murder, and not innocent. That law must be vindicated. The penalty incurred must be paid, and the law and sanction thus created made operative so as to deter from such crimes in the future.

Therefore the Kaiser must die.

Only in this way and at this time shall we perform for the good of the world, the just verdict of civilization—an example and a warning for the future.

Again, when the Kaiser, pursuant to the plan outlined, has been convicted and punished, the Nations of the World will find that something much greater than the mere punishment of this malefactor has been accomplished. The day after the death of the Kaiser the world will wake to find itself rich in the possession of a Body of Rules of International Law prescribing and enforcing the civilized conduct of war so that in no event shall happen such barbarities as in this war have made millions suffer untold pain. This result alone is worth the forward step—the death of the Kaiser is but a by-product in the creation of this wonderful world advance. The opportunity to give such sanction to the growth of civilization should not be lost. It would be lost were any other ground adopted under which he should be punished.

Let any madcap individual of the future know that when as King, Emperor or Prime Minister, he thus shall attempt to overturn the customs of war established by the concurrence of the Society of Nations, and glory in his crime, that the penalty of personal retribution hangs on the heels of his acts, and that he must make such a decision at his own personal risk and peril.

In the past such a thing has never been ruled. It is true we would now make a new precedent. It is because no such crimes have ever been committed in the history of the world during 300 years. Before that time if the perpetrator was successful, he was safe, just as he would have been now. If unsuccessful, he went down to ignominy and defeat. Napoleon, the only near approach to William in his mad attempt to rule the world, never indulged in such barbarities, and looked at merely as a disturber of the peace, the doctrine of the divine right of kings was sufficient for his personal protection in 1815 to prevent the moving by any one of such a judgment against him.

The obvious objection to this provision of international law that murder in war, when accompanied by certain con-

ditions, shall constitute murder, and be punishable as such, is that in so prescribing the Allied Nations would be creating an *ex post facto* law and enacting that as a crime, which was not a crime theretofore. The reply is that the objection of an *ex post facto* law is no real objection. Such a constitutional provision is an American stipulation obtaining in American constitutions, and having no validity in the nature of things in themselves. No constitution limits the activities of the Allied Nations in this case.

Again, in this instance, circumstances exist which make an *ex post facto law* less objectionable than usual. Thus, the law forbidding the act, the breach of its provisions, namely, murder in war under the conditions stated, existed before the act was committed. The wrongdoer, therefore, knew that his act was forbidden but that no penalty was prescribed. He must therefore have known that a penalty of some kind was fitting and might at any time be added to the prohibition. What the penalty would be, namely, death, was clearly forshadowed by the similar provision in Municipal Law. With great propriety, therefore, he may be said, in committing the acts which constituted breaches of this law, to have taken the chances. When to these conditions there was added the circumstance that no constitution containing a prohibition of an *ex post facto* law existed in the premises to hamper the action of the law-making power, it is evident that he took his chances with his eyes wide open. Therefore he can not now justly complain if the full penalty of the law is awarded against him.

As to the objection that the law is new, the answer is that the law is as old as the decalogue in the municipal law, and over twenty years old since The Hague in international law—the only thing new about it is the addition of the sanction of the penalty for its infraction. This we are entitled to add by reason of our victory, whereby we are en-

abled to give it a sanction without which it might perish from the earth.

It is recommended, therefore, that the Allies proceed as follows:

Let them create a special international tribunal with jurisdiction and machinery to try the Kaiser and all other individuals responsible for the ordering or execution of these unspeakable crimes—preferably a kind of International Court, whose proceedings would not be hampered by the technical rules of evidence and procedure of municipal courts, but capable of deciding on moral evidence such as is now held sufficient for international tribunals and arbitrations.

Let them try these persons for their lives before this tribunal. Let the judgment be rendered in accord with justice and equity and the international law as declared by The Hague Conference, and then

Let that judgment be enforced.

This despicable example of an "armored knight with shining sword," who flies to safety at the first appearance of personal peril, should suffer the judgment his conduct so richly merits, and incur the penalty of his misdeeds, and just as a common malefactor be condemned by the justice of mankind—

"To be hanged by the neck until he is dead."

But it may be, that the suggestion above made, may prove too revolutionary and extreme to be satisfactory, to minds fashioned on a more conservative mould.

The problem presented is how to punish the Kaiser for his crime, and yet to so proceed, according to the principles of municipal law as projected into the field of international law, that no one of such principles shall be set aside, by a resort to arbitrary force.

Respectable authorities in international law—Phillimore and Bynkershock, have indeed laid it down as an axiomatic principle of that science, that the personality of the sovereign is immune from criminal prosecution. The unprecedented circumstances of the case in hand, prove the absurdity of their dictum; but, at the same time, require us in taking a course opposed to their contentions, to hew as close to the line as possible.

The argument above outlined proceeds on the following basis:

It frankly engages to use force to establish one of its premises without stopping to establish that premise according to the principles of municipal law. The moral truths or principles established by The Hague Conference are treated by a forced construction as statutes binding on the international world. Note that the addition of a penalty to the statute when thus established, in no way runs counter to any of our principles of municipal law. The courts in England have, from the existence of a statute forbidding an act, implied a punishment suitable for its enforcement. This because those courts are not bound by any constitution forbidding the passage of *ex post facto* laws. Such precedents do not exist in America because of their written constitutions. The English rule could properly be adopted by the International Court.

The argument further proceeds on the following basis:

In view of the fact that the Allies, the majority of the Society of Nations, have an absolute right in the premises to do as they please in the field of international law in regard to the matter, the plan proposed suggests that they shall act entirely in accord with the principles of municipal law up to the point of considering the moral rule (conditionally agreed on), as changed to an unconditional stat-

ute. At this point, because of the humane considerations affecting the matter, requiring for the benefit of the nations the establishment of such a rule, the suggestion is made that the conditional moral rule may be changed to an unconditional statute by force. This is advised without further technical steps on the ground that the existence of the power should lead us to establish the rule now, when the opportunity is offered. The fact that in extending the rule, to meet the new conditions and so establish a new precedent, we are doing so in accord with the growth of the law and the main considerations of justice and equity involved in the case prompts and justifies this advice.

To many minds this forcing of a conditional moral rule into an unconditional statute binding on the nations by reason of the power resting in the majority of the nations, will seem an arbitrary act not fulfilling all the proper conditions of the problem—a problem which requires that, so far as possible, in condemning the Kaiser, we shall project the principles of municipal law into the field of international law and follow them up by a judgment which will be in accord with the principles of the municipal law so projected.

To such minds, unwilling to use arbitrary force even to attain so great an object, the following plan, supported by the following argument, will be more in accord with true principles.

Human activities in the sphere of municipal law covering actions within and subject to a sovereignty may be called "Field A." Human activities in the sphere of international law covering activities occurring between sovereignties may be called "Field B."

When operating in "Field A," human activities are curbed and controlled by moral rules and aesthetic principles, many of which have passed into laws with sanctions and penalties. Under this province, murder is a crime punishable with death.

When operating in "Field B," human activities are un-

curbed and uncontrolled by any rule of law in the strict sense,—there being no central authority,—except in so far as learned jurists have argued and claimed for that province of the law a projection into its sphere of the morals and aesthetic conceptions and principles derived from municipal law. In this way this chaos in "Field B" may be said to be tempered by these rulings of great jurists, together with the codification of the same into the rules laid down by the Hague Tribunal. Under this province of the law, murder occurring in the course of war is not murder. But under the exceptions to this rule made by the dicta of learned jurists and the codification of these dicta in the declarations of the Hague Conference, murder under the conditions named in the course of war, is murder without the addition of a penalty; in other words, those acts are forbidden but no penalty prescribed.

The Kaiser, in perpetrating the various acts of frightfulness embodied in the "Spurlos versenkt" policy; and his other acts which have made this war hideous, has acted on the proposition that human activities in the sphere of international law are controlled by no principles, morals or ethics or rules of law. In other words, that this province of the law is chaos. He has used force and frightfulness without limitation. The Allies, having met him with force, have conquered him.

Before 300 years ago, the inevitable result would have been that the Kaiser would have been led in triumph behind the Chariots, and thereafter killed, probably after torture, as witness the Roman triumphs.

Within the last 300 years, no instance of such frightful barbarities exists, and, therefore, no precedent as to how it should be dealt with. The Allies are entitled to use in relation to the Kaiser's activities within this "Field B" of international law the same force, uncontrolled by any moral or ethical principles, so far as their right so to do is involved. But the moral and ethical nature of the ideals of

the Allied peoples prevent their armies proceeding into Germany and committing the atrocities committed by the Germans on the Belgians and on the Frenchmen of Northern France, and these same conditions likewise prevent the Allies from adopting such punishments of the Kaiser for his acts as, for instance, boiling him in oil or asphyxiating him with his own gases, or using other cruel forms, sometimes hitherto used. This because their own moral and ethical ideas, conceptions and principles derived from their municipal laws are so strong; that these cannot be submerged, even though the provocation is compelling.

The Kaiser, when hailed before an international tribunal such as is herein suggested, has outside of the denial of the actual doing of the acts claimed, which must be proved against him in the ordinary way, only one defense; that is, that his trial and punishment would be under an *ex post facto* law—a law making a crime of acts which had not hitherto been considered to be a crime.

In making this claim he will be claiming that certain principles of municipal law have been projected into international law so as to make that province of the law subject to the same moral principles as in municipal law. In so doing he would be acting in an utterly inconsistent manner, and yet appealing to the moral nature of the Allies to make out his plea, and claiming in the province of international law the existence of a limited law and order instead of chaos.

The answer of the Allies should be that they, as a majority of the individual sovereignties constituting the Society of Nations, have the right to make laws for that Society. The law making power is in the majority of the nations constituting the Society of Nations. That body has a right to sit and now, after the event, make laws, applying to these matters; and when they pass a rule and place a sanction upon it, such law becomes international law binding as such on the Society of Nations. Consequently, the major-

ity of the nations constituting the Society of Nations may now enact the Rules of the Hague Conference and attach a penalty, and may make those rules retroactive. The fact that in so enacting these rules they would now create new rules of law making acts offenses which were not offenses prior to the new enactment, and prescribing a penalty when no penalty had been prescribed prior to the new enactment, and thus are enacting an *ex post facto* law, does not interfere with the full effect to be given to that law even under the principles of our municipal laws.

For the interests of the Society of Nations as a whole, and the value of the rule of law prescribed, namely, that murder, under certain conditions occurring in war, shall constitute murder and be punishable as such, and that war, when waged, shall be waged under Civilized Rules, is of far more importance to the community of nations than the interests of the criminal who has committed the acts—the rule forbidding an *ex post facto* law being one founded on a policy of mercy to the criminal, and therefore being one which must yield to the greater law of the "safety of the public."

The rule forbidding murder is of primary ethical importance; the rule forbidding the passage of an *ex post facto law* is of secondary ethical importance. The latter must yield to the former when their clash imperils the greater interests of the community involved.

For instance, under municipal laws, while the American law making powers, the Congress of the United States and the Legislature of the several sovereign states, are generally, by written constitutions, forbidden to make an *ex post facto* law, this prohibition does not extend to the English constitution, and there is no prohibition in England against this class of legislation. Just as Parliament is fully entitled to pass an *ex post facto* law, so is this new Parliament of Nations embraced in the Society of Nations enti-

tled to pass an *ex post facto* law and punish a criminal under it.

Therefore the Kaiser's defense founded upon this objection is invalid under the general principles of municipal law, and so the projection into international law of the principles of municipal law governing the case presents no barrier to the relief suggested.

The consequence is that, under the circumstances of the case, the Allies are fully justified, on the principles of morality and ethics applicable, and the principles as to growth existing in municipal and international law, to meet the novel facts of the unprecedented case arising by the establishment of a new precedent which will advance the growth of international law according to its principles and precedents, and cause the new precedent to be one established in the ordinary way of the growth of all law from precedent to precedent according to principles and theories already existing.

In this way we are fully entitled to meet the breach of a moral truth by a resultant sentence founded on an *ex post facto* law based on the analogies and principles of the growth of all law. And when, in addition, we have the Kaiser's admission—clogged, it is true, by an immaterial other condition and a time limit—of the truth of the moral principles set forth by the Hague Conference, it would seem that the voice of criticism is justly stilled.

In view of the foregoing considerations, it is therefore advised as follows:

That a new meeting of the Society of Nations, or even preferably composed only of the Allies, similar to the former conferences at the Hague be called. At such meeting pass the necessary legislation to confirm the previous rules of war of the Hague Conference, attach penalties to the prohibitions enacted, make the provisions of the rules retroactive so as to clearly apply to the deeds of the Kaiser and

the other perpetrators of these wanton acts, and thereupon create a new international court with full jurisdiction to pass upon the offenses heretofore or hereafter occurring under the new Code.

By taking proceedings against the Kaiser in this way through an international tribunal, charging him with the breaches of international law of which he has been guilty and trying and condemning him accordingly, the Allies will proceed in strict compliance with the principles of Municipal Law and according to the justice and equity of the case. Thus they will, with frankness and truth, use their power in the premises without evasion or subtlety to declare on true principles involved in the laws and customs for which they stand, his liability to the penalties he has incurred, and thus exemplify the spirit of justice and equity for which they have fought.

And yet having thus proved that the Kaiser can be hanged according to due observance of certain preliminaries in municipal law, both according to the law and the prophets, why, since no one will gainsay that the Allied Nations have the power so to accomplish his death strictly in accordance with the law, should we pause to go through the necessary formalities; why, having absolute power in the premises, being controlled only by our own sentiments, should we not expedite the result and cut the gordian knot? For if he can be legally hanged, and in this way he would be most lawfully and well hanged; then, it will make no real difference, provided he be hanged, whether he be well hanged or not.

This suggestion that the gordian knot should be cut without too much attention to formalities is worthy of due consideration. Under the extraordinary conditions of the problem, and the imperative necessity that the crimes of William Hohenzollern shall meet their well-merited punishment to so remain for all future time a lighted beacon before the eyes of all men, an example, greater even,

if made in defiance of precedent to meet a case which was in itself a defiance of all precedent, than if slavishly following the precedents,—these considerations and the weighing of expediencies involved, render it proper that the first plan above set forth to encompass his punishment should be carried out as suggested. For strong measures, when supported by strong reason, are for strong men to use on strong occasions.

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